Supreme Court No. 80850-3
Court of Appeals No. 56935-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY E. PUGH,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Other Jurisdictions

Other Authorities

Rules

A. SUMMARY OF APPEAL

Timothy Pugh's state constitutional right to meet the witnesses against him face to face was violated when the complaining witness's accusatory statements to a 911 operator were admitted at trial, where Mr. Pugh was not provided an opportunity to cross-examine the witness, and where the State did not demonstrate the witness was unavailable to testify.

B. ISSUES PRESENTED

1. Where a complaining witness's accusatory statements to a 911 operator are admitted at trial, the person must be deemed a "witness" against the accused within the meaning of article I, section 22 of the Washington Constitution. Was Mr. Pugh's state constitutional right to confront witnesses violated, where the complainant's accusatory statements to a 911 operator were admitted at trial but Mr. Pugh never had an opportunity to cross-examine her?

2. Should this Court interpret article I, section 22 to require a showing of unavailability before a witness's hearsay statements may be admitted at trial in the witness's absence?

3. Did admission of the hearsay statements violate the Sixth Amendment?

C. STATEMENT OF THE CASE

In November 2004, Bridgette Pugh received a protection order against her husband Timothy Pugh. Exhibit 17. On March 31, 2005, Ms. Pugh called 911 and accused Mr. Pugh of assaulting her and violating the no-contact order.[1] Ms. Pugh had two prior convictions for false reporting. 7/11/05RP 18-22.

When the police arrived, Ms. Pugh had a bruised face and chipped tooth. 7/19/05RP 279-80. Police arrested Mr. Pugh in the parking lot outside the apartment. 7/19/05RP 284-86. He was charged with one count of felony violation of a court order based on assault.[2] CP 94.

The State served a subpoena on Ms. Pugh but she did not appear at trial. 7/28/05RP 66. The court admitted, over objection, a recording of Ms. Pugh's 911 phone call as an excited utterance under ER 803(a)(2), although Mr. Pugh had no opportunity to cross-examine Ms. Pugh regarding those statements. 7/11/05RP 102; 7/28/05RP 16. Mr. Pugh was convicted as charged. CP 8.

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[1] A transcript of the 911 call is attached to this brief as an appendix.

[2] Mr. Pugh was later charged and convicted of two counts of misdemeanor violation of a court order and one count of witness tampering. The Court of Appeals reversed the conviction for witness tampering and remanded for a new trial. None of those convictions is at issue in this Court.

On appeal, Mr. Pugh argued his right to confront the witnesses against him, guaranteed by both the federal and state constitutions, was violated when the trial court admitted Ms. Pugh's hearsay statements to the 911 operator, as Mr. Pugh had no opportunity to cross-examine her. Mr. Pugh addressed the issue separately under article I, section 22 of the Washington Constitution, providing a Gunwall[3] analysis.

The Court of Appeals held neither Mr. Pugh's federal nor state constitutional right to confrontation was violated. Slip Op. at 5-14. The court analyzed article I, section 22 separately but concluded it did not provide broader protection than the Sixth Amendment. Slip Op. at 9. The court therefore affirmed the conviction. Slip Op. at 15.

Mr. Pugh petitioned for review, arguing this Court should hold he had an independent state constitutional right to confront the witness that was violated. This Court granted review.

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[3] State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986).

D. ARGUMENT

1. MR. PUGH'S STATE CONSTITUTIONAL RIGHT TO MEET THE WITNESSES AGAINST HIM FACE TO FACE WAS VIOLATED WHEN THE COMPLAINING WITNESS'S ACCUSATORY STATEMENTS TO A 911 OPERATOR WERE ADMITTED AT TRIAL, WHERE (1) MR. PUGH WAS NOT PROVIDED AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESS, AND (2) THE STATE DID NOT DEMONSTRATE THE WITNESS WAS UNAVAILABLE TO TESTIFY

a. "Nontestimonial" hearsay statements admitted against an accused at a criminal trial are subject to protection by article I, section 22 of the Washington Constitution. In Crawford v. Washington, the United States Supreme Court overruled decades of federal confrontation clause case law by holding that hearsay statements defined as "testimonial" are inadmissible in a criminal trial, unless the witness testifies or the State demonstrates the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 51, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (only "testimonial" statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause) (overruling Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)).

In Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), the Court made explicit what was implicit in Crawford -- the Sixth Amendment right to confrontation does not apply to hearsay statements that are not "testimonial." Davis, 547 U.S. at 821 (Confrontation Clause "applies to 'witnesses' against the accused -- in other words, those who 'bear testimony,' which marks not only the core of the constitutional provision but also its perimeter") (citing Crawford, 541 U.S. at 51 (citing 1 N. Webster, An American Dictionary of the English Language (1828)); Bockting, 127 S.Ct. at 1183 (Confrontation Clause "has no application" to nontestimonial hearsay statements).

In the process, the United States Supreme Court made clear that the vast range of hearsay statements no longer subject to protection by the Sixth Amendment *are* subject to further protection by the states. Crawford, 541 U.S. at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law.").

Crawford teaches that whatever application a state constitution might have to hearsay statements, that application is not tied to substantive evidence law. Crawford stated, "Where

testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" Crawford, 541 U.S. at 61. The same must be true of the Framers of the Washington Constitution -- they must have intended the state constitutional right to confrontation be independent of, and superior to, evidence law.

This Court first considered whether article I, section 22's confrontation right is broader than the Sixth Amendment's in State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). Foster analyzed whether RCW 9A.44.150, which permits some child victims to testify via closed-circuit television, violated either the federal or state confrontation clauses. Five members of the Court concluded article 1, section 22 must be interpreted independently from the Sixth Amendment. Id. at 473-74 (Alexander, J., concurring in part, dissenting in part); Id. at 481-94 (Johnson, J., dissenting).

This Court has not addressed whether article I, section 22 grants a broader right to confrontation in the context of hearsay statements, but has indicated that it might. See State v. Palomo, 113 Wn.2d 789, 794, 783 P.2d 575 (1989) (recognizing article I, section 22 "arguably gives broader protection" than Sixth

Amendment to excited utterances, but declining to address because not fully briefed); State v. Ohlson, 162 Wn.2d 1, 10 n.1, 168 P.3d 1273 (2007) (same).

Given the recency of the Supreme Court's decision in Davis, few state courts have considered whether their state constitutions provide a broader right to confrontation than the Sixth Amendment as stated in Davis. But Davis's pronouncement that the Sixth Amendment provides *no* protection for "nontestimonial" hearsay makes likely that other states will interpret their constitutions as providing some of the protections Davis stripped away. Indeed, the Hawaii Supreme Court has interpreted its state constitution as continuing to provide an independent right to confront nontestimonial hearsay even after Davis. State v. Fields, 115 Haw. 503, 516 (2007) (affirming Roberts' continued viability with respect to nontestimonial hearsay). Similarly, prior to Davis (but after Crawford), when it was still unclear whether and how the Sixth Amendment applied to nontestimonial statements, other state courts also interpreted their state constitutions independently and held the Roberts framework continued to apply to nontestimonial

hearsay. See, e.g., Compan v. People, 121 P.3d 876, 885 (Colo. 2005); State v. Cook, 340 Ore. 530, 540-41 (2006).[4] Thus, applying Roberts, those courts held that, under their state constitutions, out-of-court statements are inadmissible against an accused unless the prosecution shows the declarant is unavailable and the statements bear sufficient indicia of reliability. Fields, 115 Haw. at 516; Compan, 121 P.3d at 885; Cook, 340 Ore. at 540-41.

Further, even in the pre-Crawford era, many state courts interpreted their state constitutions independently as providing greater protection than the Sixth Amendment. For instance, after the Supreme Court announced in White v. Illinois, 502 U.S. 346, 356, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) that the Confrontation Clause did not apply to hearsay offered under a firmly rooted hearsay exception, several states rejected White and continued to impose an unavailability requirement as a matter of state constitutional law. See, e.g., State v. McGriff, 871 P.2d 782, 790

[4] Other states had no reason to address their state constitutions separately, as they held Roberts continued to apply under the federal constitution. See State v. Rivera, 268 Conn. 351, 365 (2004); State v. Hosty, 944 So.2d 255, 260 (Fla. 2006); Demons v. State, 277 Ga. 724, 595 S.E.2d 76, 80 (Ga. 2004); Napier v. State, 827 N.E.2d 565, 569 (Ind. Ct. App. 2005); State v. Martin, 695 N.W.2d 578, 584 (Minn. 2005); State v. Mizenko, 2006 MT 11, P33, 127 P.3d 458 (Mont. 2006); State v. Dedman, 136 N.M. 561, 102 P.3d 628, 636 (N.M. 2004); State v. Manuel, 281 Wis.2d 554, 697 N.W.2d 811, 826 (2005).

(Haw. 1994); State v. Lopez, 926 P.2d 784, 789 (N.M. Ct. App. 1996); State v. Moore, 49 P.3d 785, 792 (Or. 2002). Other states interpreted their constitutions as providing even broader confrontation rights in some contexts. See, e.g., Arndt v. State, 642 N.E.2d 224, 228 (Ind. 1994) (holding Indiana Constitution requires "full confrontation" including the right to cross-examine hearsay declarant); State v. Clark, 1998 MT 221, P25, 964 P.3d 766 (Mont. 1998) (holding laboratory reports require opportunity for cross-examination under Montana Constitution).

Consistent with these decisions from other states, this Court has observed that our own state constitution serves to restrict state government and protect the fundamental rights of Washington citizens, a function that is closely associated with our sovereignty. State v. Coe, 101 Wn.2d 364, 373-74, 679 P.3d 353 (1984).

A Gunwall[5] analysis reveals article I, section 22 should be interpreted as providing broader protection to individual rights in

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[5] The six non-exclusive Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

this case. Specifically, this Court should find article I, section 22 provides an absolute right to cross-examine a complaining witness who makes accusatory statements to a 911 operator. Alternatively, this Court should find article I, section 22 requires a showing of unavailability before the witness's statements may be admitted against the accused in a criminal trial in the witness's absence.

b. Article I, section 22 should be interpreted as providing a broader right to confrontation than the federal constitution in this case -- *Gunwall* analysis.

i. Factors one and two – textual language of the Washington Constitution and significant differences between the texts of article I, section 22 and the Sixth Amendment. Article 1, section 22 provides an accused the "the right . . . to meet the witnesses against him face to face." The Sixth Amendment states a criminal defendant has the right "to be confronted by the witnesses against him." These linguistic differences demonstrate an intent to create a state constitutional right independent of the federal right. Foster, 135 Wn.2d at 485 (Johnson, J., dissenting).

In addition, article I, section 22 explicitly enunciates several rights not specifically delineated in the Sixth Amendment: the right to appear in person; the right to have a copy of the charge; the right

to testify in one's own behalf; and the right to appeal in all cases. Const. art. I, § 22. "These additional specific rights conferred support the conclusion that the state provision must be interpreted independent of its federal counterpart -- an interpretation that is more restrictive against legislative interference with an accused's rights." Foster, 135 Wn.2d at 486 (Johnson, J., dissenting).

When interpreting constitutional provisions, this Court must look to the plain language and accord it its reasonable interpretation. Washington Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 476, 90 P.3d 42 (2004). Article I, section 22 provides an accused the right to "meet the witnesses against him." One definition of "witness" from the same 1828 dictionary cited by Crawford but not acknowledged by the Court, is "[a] person who knows or sees any thing; one personally present; as, he was *witness;* he was an *eye-witness*." 2 Noah Webster, An American Dictionary of the English Language 114 (1828). This definition is broader than the definition the Crawford Court adopted. 541 U.S. at 51 (defining "witness" as one who "bears testimony").

This textual analysis indicates article I, section 22 should be interpreted independently of the Sixth Amendment. It also indicates the Framers understood article I, section 22 to guarantee a right to

confront a complaining witness regardless of whether the witness's out-of-court statements were "testimonial."

ii. Pre-existing state law. Contrary to Crawford's conclusion, neither the Framers of the United States Constitution nor the Framers of Washington Constitution drew a distinction between "testimonial" and "nontestimonial" statements for purposes of determining the right to confrontation. Crawford, 541 U.S. at 71-72 (Rehnquist, J., concurring) ("We have never drawn a distinction between testimonial and nontestimonial statements. And for that matter, neither has any other court of which I am aware.").

No criminal procedure or evidence treatise prior to the founding of the United States Constitution suggested that out-of-court statements describing criminal conduct were admissible at trial. Jeffrey L. Fisher, What Happened -- And What is Happening -- To the Confrontation Clause, 15 J.L. & Pol'y 587, 594 n.28 (2007). As of 1789, a dying declaration of a murder victim was the only kind of unsworn out-of-court statement that could be admitted in a criminal trial to prove the guilt of the defendant; the modern hearsay exceptions had not yet been developed. Thomas Y. Davies, Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of

the Scope of the Original Confrontation Clause, 15 J.L. & Pol'y 349, 352 (2007). The purpose of the hearsay ban was, in part, to safeguard the accused's right to cross-examination. Id. at 393; 1 Simon Greenleaf, A Treatise on the Law of Evidence, 171-72 (14th ed. 1883).

Courts began to recognize new hearsay exceptions during the first half of the nineteenth century, including the "res gestae" exception. Davies, Not "The Framers' Design", supra, at 456-58. The res gestae exception applied to statements uttered by participants in an event while the event was ongoing, regardless of the declarant's state of excitement. State v. Aldrick, 97 Wash. 593, 596, 166 P. 1130 (1917). Res gestae statements were

> events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks.

Id.

The key to admissibility of res gestae statements was their contemporaneousness, or near-contemporaneousness, with the event. See, e.g., State v. Smith, 26 Wash. 354, 355-57, 67 P. 70 (1901) (holding complainant's statements admissible as res gestae

where made "almost immediately after the time of the alleged offense").

Although this Court recognized an exception for res gestae statements by 1917, twenty years earlier in State v. Hunter, this Court showed no indication it recognized the exception. 18 Wash. 670, 672, 52 P. 247 (1898) (holding statements by rape victim to mother "immediately, or at least within an hour, after the assault," were admissible only as to fact of complaint, as "anything beyond that is hearsay of the most dangerous character").

Even after Washington courts began to admit res gestae statements of complaining witnesses, courts and litigants continued to expect the witness would either testify at trial or be genuinely unavailable. See, e.g., State v. Hazzard, 75 Wash. 5, 23, 134 P. 514 (1913) (holding admissible res gestae statements of complaining witness who was deceased at time of trial); State v. Ripley, 32 Wash. 182, 190-91, 72 P. 1036 (1903) (holding admissible res gestae statements of prosecuting witness who testified at trial); Smith, 26 Wash. at 355-57 (holding admissible res gestae statements of complaining witness who was mentally incompetent at time of trial).

This examination of early cases shows that neither the Framers of the Washington Constitution nor courts in the ensuing decades would have conceived of allowing a complaining witness's accusatory hearsay statements be admitted in a criminal trial unless the witness testified or was genuinely unavailable to testify.

iii. State constitutional and common law history. In the 20th century, Washington adopted the excited utterance hearsay exception. Admissibility of excited utterances turns on the declarant's state of excitement rather than the statement's timing in relation with the event. ER 803(a)(2) (defining excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). In part because excited utterances need not be contemporaneous with the event, Washington courts openly acknowledge the excited utterance rule "is not as restrictive as the requirements of the common law [res gestae] exception." State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

Although the excited utterance rule is beyond the Framers' understanding and broader than the common law res gestae exception, this Court has never considered whether article I, section 22 provides an independent right to confront excited

utterance declarants. Instead, this Court has considered only whether the federal constitution provides such a right and has followed the lead of the United States Supreme Court in interpreting that right. Thus, when the United States Supreme Court held hearsay statements other than those made at prior judicial proceedings were admissible without regard to any attempt to procure the declarant's live testimony, this Court followed suit and held the State need not show witness unavailability in order for excited utterances to be admissible. Palomo, 113 Wn.2d at 795 (relying on United States v. Inadi, 475 U.S. 387, 393-94, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)).

After Davis, this Court applied the United States Supreme Court's "primary purpose" test and held excited utterances made to 911 operators were admissible so long as the "primary purpose" of the interrogation was to render aid. Ohlson, 162 Wn.2d at 11-12.

Although this Court has never held article I, section 22 provides an independent or broader right to confront excited utterance declarants than the Sixth Amendment, it has indicated an openness to doing so. See Ohlson, 162 Wn.2d at 10 n.1; Palomo, 113 Wn.2d at 794.

iv. Differences in structure between the federal and state constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This means that, at the state level, protection from legislative power is found solely in positive constitutional affirmations of individual liberties. Cornell W. Clayton, Toward a Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 74 (2001/2002).

These considerations indicate the Washington Constitution should be interpreted as granting broader protection to individual rights than the federal constitution.

v. Matters of particular state interest. The regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the State Confrontation Clause. Foster, 135 Wn.2d at 494 (Johnson, J., dissenting).

Of significant state concern is the perceived fairness of criminal trials. The trend in recent decades of allowing prosecutors to try cases by relying on the out-of-court accusations of

complainants who are not present at trial but are nonetheless available to testify is unprecedented in criminal trials. See Richard D. Friedman & Bridget McCormack, Dial-In Testimony, 150 U. Pa. L. Rev. 1171, 1180 (2002).

Requiring direct confrontation between a defendant and his accusers is considered by society to be a fundamental component of a fair trial. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1017-19, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988) (describing face-to-face confrontation as part of our societal code of ethics and quoting President Eisenhower as stating, "In this country, if someone . . . accuses you, he must [do so to your face]."). The right to confrontation serves a deep, fundamental role in our sense of justice. It should function as a procedural guarantee, regardless of its effect on accuracy or truth. See, e.g., Crawford, 541 U.S. at 61, 67-68 (noting that Confrontation Clause does not ensure reliable evidence but rather ensures that State's power to convict is checked by particular procedural mechanisms).

Further, confrontation, through cross-examination, allowing the jury to evaluate the witness's demeanor, and requiring the witness to testify under oath, furthers the truth-finding function of the trial. Tim Lininger, Reconceptualizing Confrontation After

Davis, 85 Tex. L. Rev. 271, 295 (Dec. 2006). It is unrealistic to assume everyone who complains about a particular violent offense is telling the truth; in domestic violence cases, "the most common causes of lying or exaggeration relate to anger over male infidelity or child custody disputes." Myrna S. Raeder, Domestic Violence Cases After Davis: Is the Glass Half Empty or Half Full?, 15 J.L. & Pol'y 759, 784 (2007).

Although domestic violence cases present special challenges in dealing with recanting or reluctant witnesses, "[t]he state should not require the accused to forego confrontation simply because such a policy would be expedient in prosecutions of domestic violence." Lininger, Reconceptualizing Confrontation After Davis, supra, at 293. Any undue pressures on the complainant can be mitigated through a forfeiture doctrine that allows admission of hearsay statements if the State can show the defendant was responsible for the witness's absence. Id. at 294-95.

These state and local considerations favor a rule that requires face-to-face confrontation between the defendant and his accusers without regard to whether the complainant was facing an ongoing emergency at the time of the statements.

c. This Court should hold article I, section 22 provides a right to confront a complaining witness.

i. A complaining witness's accusatory statements to a 911 operator should be inadmissible unless the defendant has had an opportunity to cross-examine the witness.

Some commentators have argued that an accusatory approach to defining what statements are protected by the Confrontation Clause most closely satisfies concerns about the need for face-to-face confrontation and is more consistent with the Framers' intent. Raeder, Domestic Violence Cases After Davis, supra, at 776 (citing Robert P. Mosteller, "Testimonial" and the Formalistic Definition -- The case for an "Accusatorial" Fix, 20 Crim. Just. 14 (Summer, 2005); Robert P. Mosteller, Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, 71 Brook. L. Rev. 411 (2005)).

The core concern in an accusatory approach is whether the declarant is asserting the defendant has committed a crime. The approach therefore takes account of the content of the statement and its importance and role in the case as evidence.

Accusatory statements to 911 operators would be subject to Confrontation Clause protection under this approach. A caller to

911 generally knows that, directly or indirectly, he or she is providing information to police that will almost certainly lead to an official response, including possible prosecution. Friedman & McCormack, Dial-In Testimony, supra, at 1181. As Crawford recognized, statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," 541 U.S. at 51, should be subject to Confrontation Clause protection.

As early as 1902, this Court explained article 1, section 22's confrontation right guarantees the right to cross-examine the witness in open court in the presence of the accused. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902). Crawford held that where Confrontation Clause protection applies, either the witness must testify or the State must demonstrate the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. at 68. These are essential and fundamental components of confrontation. They should apply where the State seeks to admit accusatorial hearsay statements of a complaining witness.

ii. A complaining witness's hearsay statements should be inadmissible in the witness's absence unless the State shows the witness is unavailable to testify. As discussed above, several sister-state courts have independently interpreted their state constitutions to require a showing of witness unavailability before hearsay statements may be admitted at trial in the witness's absence. Compan, 121 P.3d at 885; Fields, 115 Haw. at 516; Lopez, 926 P.2d at 789; Cook, 340 Ore. at 540-41. Such a rule establishes a preference for live testimony irrespective of the hearsay exception invoked by the State. Thus, the rule would safeguard the right to confrontation while recognizing the need to give way to necessity in some cases.

iii. Under either test, the statements in this case were inadmissible. Bridgette Pugh's accusatorial hearsay statements made in response to a 911 operator's questions were admitted at trial in her absence, even though Mr. Pugh had no prior opportunity to cross-examine her and the State did not show she was unavailable. Thus, under either test proposed above, the statements were inadmissible and Mr. Pugh's state constitutional right to confront the witness was violated.

d. Mr. Pugh did not forfeit his constitutional right to confront the witness. Forfeiture by wrongdoing applies only when the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Giles v. California, __ U.S. __, 128 S.Ct. 2678, 2687, 171 L.Ed.2d 488 (2008) ((citing Fed. Rule of Evid. 804(b)(6)). The State must show the defendant's wrongdoing caused the witness's unavailability by clear, cogent and convincing evidence. State v. Mason, 160 Wn.2d 910, 926-27, 162 P.3d 396 (2007).

As the doctrine of forfeiture has its roots in principles of equity, not the constitution, the State must invoke the doctrine at trial to preserve the issue for appeal. State v. Tyler, 138 Wn. App. 120, 129, 155 P.3d 1002 (2007). Where the record is insufficient to show by clear, cogent and convincing evidence that the defendant caused the witness's unavailability, and where the State did not raise the issue below, the doctrine of forfeiture does not apply. Id.

In this case, the record is not sufficient to conclude Ms. Pugh was legally unavailable to testify. Police served a subpoena on her, but there is no evidence the State made additional efforts to secure her presence. 7/28/05RP 66; 7/29/05RP 35.

In addition, the record is insufficient to show Mr. Pugh *caused* Ms. Pugh's absence. Any evidence of witness tampering was not sufficient to sustain the State's burden of proof, as the crime of witness tampering does not require proof the defendant's conduct actually caused the witness to become unavailable to testify. See RCW 9A.72.120.

Because the record contains insufficient evidence of forfeiture and the State did not raise the issue below, Mr. Pugh cannot be deemed to have forfeited his right to confrontation.

e. The error was not harmless. Confrontation Clause errors are harmless only if the State proves beyond a reasonable doubt there is no reasonable probability the outcome of the trial would have been different had the error not occurred. Mason, 160 Wn.2d at 927. Because the State's principal evidence against Mr. Pugh was Ms. Pugh's hearsay statements to the 911 operator, the error in admitting the statements was not harmless.

2. MR. PUGH'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS WAS VIOLATED

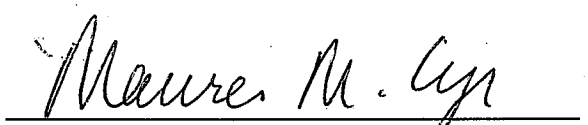
Under Davis, a witness's statements to a 911 operator are "testimonial" for purposes of the Sixth Amendment when the circumstances objectively indicate there is no ongoing emergency

and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis, 547 U.S. at 822. Here, Ms. Pugh made statements about past events and made clear there was no ongoing emergency, as Mr. Pugh was no longer at the scene but was "walking away." Appendix at 2, 4. Thus, under Davis, Ms. Pugh's statements to the operator were "testimonial" and Mr. Pugh had a Sixth Amendment right to cross-examine her about the statements.

E. CONCLUSION

Admission at trial of the complaining witness's accusatorial statements to a 911 operator violated Mr. Pugh's state and federal constitutional rights to confront the witnesses against him. The conviction must be reversed and remanded for a new trial at which either the statements are not admitted, the witness testifies, or the State shows the witness is unavailable.

Respectfully submitted this 15th day of August, 2008.



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APPENDIX

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 05-1-06304-8
vs.	)	
TIMOTHY PUGH, Defendant,	)	TRANSCRIPTION OF 9-1-1 CALL

LIZ: This is Liz (Unintelligible) at the Valley Communications Center. Today's date is March thirty-first two thousand five and the time is nine thirty-five hours. The following taped incident has been recorded from the Valley Communications master recording of March thirty-first two thousand five at zero three thirteen hours.

OPERATOR: Nine-one-one.

PUGH: My husband was beating me up really bad.

OPERATOR: What address are you're at?

PUGH: Two-oh-six-four-one (unintelligible) Avenue south (unintelligible).

OPERATOR: Okay, hold on, slow down. Are you in apartment number one?

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PUGH: Yeah.

OPERATOR: Okay, what's the name of your apartments?

PUGH: There's no name on 'em. My husband (unintelligible) he (unintelligible).

OPERATOR: Is he still there?

PUGH: No he's walking away.

OPERATOR: Any weapons?

PUGH: No.

OPERATOR: Need an ambulance?

PUGH: He fuckin' hit me as I was . . . he fuckin' hit me. I'm his fuckin' wife. (Unintelligible) . . .

OPERATOR: What's his last name?

PUGH: Pugh, P-U-G-H.

OPERATOR: His first name?

PUGH: Timothy.

OPERATOR: Timothy?

PUGH: Yep.

OPERATOR: What's his middle initial?

PUGH: E for Earl.

OPERATOR: And his date of birth?

PUGH: Nine-one-seventy.

OPERATOR: What race is he?

PUGH: Don't talk to me.

OPERATOR: What race is he?

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Seattle, Washington 98104
(206) 296-9000
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PUGH: What?

OPERATOR: What race is he?

PUGH: What? What?

OPERATOR: What race is he?

PUGH: Black.

OPERATOR: How old?

PUGH: Don't talk to me.

OPERATOR: How tall is he?

PUGH: Six uh . . . six feet.

OPERATOR: Small, medium or heavy build?

PUGH: Medium.

OPERATOR: What color hair?

PUGH: I don't care (unintelligible) put your hands on me.

OPERATOR: Mam, talk to me so I can help you. What color hair?

PUGH: He got little braids in his hair. (Unintelligible).

OPERATOR: Any eye glasses or facial hair?

PUGH: No.

OPERATOR: What color shirt or jacket?

PUGH: (Unintelligible).

OPERATOR: Mam, talk to me so I can help you. What . . .

PUGH: (Unintelligible).

UNKNOWN: (Unintelligible talking in the background).

OPERATOR: What color shirt or jacket?

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PUGH: He has a long black jacket on.

UNKNOWN: (Unintelligible talking in the background).

PUGH: (Unintelligible).

OPERATOR: Is he still there or did he leave?

PUGH: He's just outside. He fuckin' pushed me (unintelligible) . . .

OPERATOR: Does he have a vehicle?

PUGH: Nope he's walking.

OPERATOR: Which way was he walking in . . .

PUGH: (Unintelligible).

OPERATOR: did you see?

PUGH: Huh?

OPERATOR: Did you see which way he was walking?

PUGH: He was walking towards (unintelligible)?

OPERATOR: Towards where?

PUGH: Towards the street . . . seven-eleven. How? Because he was fuckin' pushin' me (unintelligible). I (unintelligible).

OPERATOR: Mam.

PUGH: I didn't do nothin'.

OPERATOR: Mam.

PUGH: Yes.

OPERATOR: How many people do you have over there? Who you . . .

PUGH: This is my aunt's (unintelligible).

OPERATOR: Are there any children there?

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PUGH: (Unintelligible).

OPERATOR: Mam you need to calm down, I can't understand you.

PUGH: He's beatin' me up (unintelligible).

OPERATOR: Okay, do you have any children there?

PUGH: Only my baby.

OPERATOR: What?

PUGH: My baby boy.

OPERATOR: Okay, do you have any . . .

PUGH: (Unintelligible).

OPERATOR: And there's no weapons or . . . correct?

PUGH: No.

OPERATOR: And you don't need an ambulance?

PUGH: Yes I (unintelligible) I do.

OPERATOR: What?

PUGH: Yes, I do. I would like an ambulance please.

OPERATOR: Can you still see him from where you are?

PUGH: I'm not gonna . . . you want me to go outside so he can beat me up so more?

OPERATOR: What?

PUGH: Do you want me to go out there and see him so he can beat me up some more?

OPERATOR: No, I didn't ask you that. I asked you if . . .

PUGH: No, I'm in the house.

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OPERATOR: you could see him from where you are now.

PUGH: (Unintelligible) he's outside of the house. He pushed me off (unintelligible). He pushed me off the (unintelligible) and chipped my tooth.

OPERATOR: He chipped your tooth?

PUGH: Yeah, he pushed me off the . . . the (unintelligible).

OPERATOR: What's your last name mam?

PUGH: Same like him, I'm married to him.

OPERATOR: And your first name?

PUGH: Bridgette. I don't have no (unintelligible).

OPERATOR: Your middle initial?

PUGH: Um L for (unintelligible).

OPERATOR: And your date of birth?

PUGH: (Unintelligible).

OPERATOR: And you said there is a restraining order in place?

PUGH: Yes there is.

OPERATOR: Okay. Has he been drinking or anything?

PUGH: (Unintelligible) that's all he ever does.

OPERATOR: I'm sorry?

PUGH: That's all he does.

OPERATOR: So that's a yes?

PUGH: Yes.

OPERATOR: Is he living there with you?

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PUGH: Nope.

OPERATOR: Did he force his way in or how did he get . . .

PUGH: I . . . I was outside (unintelligible).

OPERATOR: Okay, do you have any medical problems the aid crew needs to be aware of?

PUGH: No.

OPERATOR: Are you bleeding from somewhere or . . .

PUGH: I . . . I don't have . . . I (unintelligible) so I can go look.

OPERATOR: Where are you having pain that you need an ambulance?

PUGH: (Unintelligible) my face.

OPERATOR: And you can no longer see him, correct?

PUGH: Yes.

OPERATOR: Yes you can or . . .

PUGH: I can not.

OPERATOR: He was alone tonight, correct?

PUGH: What?

OPERATOR: He was alone tonight?

PUGH: Yes . . . yeah.

OPERATOR: Okay. Let me know when the officers or the aid crews with you.

PUGH: Hi. They . . . they're here now.

OPERATOR: Okay, I'll let you go.

PUGH: Look what he did to me.

(Call ends).

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIMOTHY PUGH, Petitioner.	)))))))))	NO. 80850-3

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 15TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] TOMOTHY PUGH 980062 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF AUGUST, 2008.

X_____

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